FILED
DEC 22 1997
CLERK

No. 97-705 (3)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

KERR-McGEE CORPORATION
and CYPRUS FOOTE MINERAL COMPANY,
Petitioners,
v.

KEE TOM FARLEY, Individually and
on Behalf of the Estate of LUCY K. FARLEY,
CARMELITA FARLEY JOE,
and HAROLD KADY, SR., Individually and
on Behalf of the ESTATE OF JULIA MAE KADY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF THE PETITION

Of Counsel:
LOUIS P. WARCHOT
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2502

BETTY JO CHRISTIAN
Counsel of Record
CHARLES G. COLE
B. KELLY KISER
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-8113
Counsel for Amicus Curiae Association of American Railroads

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

22 pp

QUESTION PRESENTED

Whether an entity subject to comprehensive federal regulation may raise in federal court a claim of implied Federal preemption of tribal court jurisdiction without first exhausting tribal court remedies?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE TENTH CIRCUIT'S DECISION IS OF SERIOUS CONCERN TO THE RAILROAD INDUSTRY	5
A. The Tenth Circuit Improperly Failed to Give Weight to the Federal Interest in Having a Federal Court Decide Questions of Federal Preemption	5
B. The Tenth Circuit's Refusal to Consider Competing Federal Interests When Applying The Tribal Exhaustion Rule Raises Serious Concerns for the Nation's Railroads	8
II. THIS COURT SHOULD CLARIFY THE SCOPE OF TRIBAL COURT EXHAUSTION	12
A. This Court's Precedent Has Been Misconstrued	12
B. This Petition Provides a Vehicle for Developing a More Flexible Exhaustion Doctrine	16
CONCLUSION	17

TABLE OF AUTHORITIES

CASES — Page

Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe, 117 F.3d 61 (2d Cir. 1997) 7
Bruce H. Lien Co. v. Three Affiliated Tribes, 93 F.3d 1412 (8th Cir. 1996) 7
Burlington Northern R.R. v. Crow Tribal Council, 940 F.2d 1239 (9th Cir. 1991) 7, 9
Burlington Northern R.R. v. Minnesota, 882 F.2d 1349 (8th Cir. 1989) 10
Burlington Northern R.R. v. Montana, 880 F.2d 1104 (9th Cir. 1989) 10, 11
Burlington Northern R.R. v. Page Grain Co., 545 N.W.2d 749 (Neb. 1996) 10
Burlington Northern R.R. v. Red Wolf, 196 F.3d 868 (9th Cir. 1996), *vacated*, 118 S. Ct. 37 (1997) 8
California Fed. Savs. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) 15
Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) 16
CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) 11
Georgia Pub. Serv. Comm'n v. CSX Transp., Inc., 484 S.E.2d 799 (Ga. Ct. App. 1997) 11
Hilton v. Guyot, 159 U.S. 113 (1895) 16
Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) 2, 3, 13, 16
Missouri Pac. R.R. v. Railroad Comm'n of Texas, 850 F.2d 264 (5th Cir. 1988), *cert. denied*, 488 U.S. 1009 (1989) 10
National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) ..... *passim*
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 12
Pennsylvania R.R. v. Pub. Serv. Comm'n, 250 U.S. 566 (1919) 15
Reservation Tel. Coop. v. Three Affiliated Tribes of the Fort Berthold Reservation, 76 F.3d 181 (8th Cir. 1996) 7
Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997) .. 3, 13, 15
Younger v. Harris, 401 U.S. 37 (1971) 16

TABLE OF AUTHORITIES—Continued

STATUTES	Page
25 U.S.C. §§ 323-328	14
42 U.S.C. §§ 2011 *et seq.*	5
49 U.S.C.A. §§ 10101 *et seq.*	4
49 U.S.C.A. § 10501(b) (2)	10
49 U.S.C.A. §§ 20101 *et seq.*	4
49 U.S.C. §§ 20101-153	9
49 U.S.C. § 20106	11
49 U.S.C. §§ 20111-113	10
49 U.S.C. § 20135	11
49 U.S.C. § 20142	11
CODE OF FEDERAL REGULATIONS	
49 C.F.R. pt. 212	10
49 C.F.R. §§ 213.31-.37	11
49 C.F.R. §§ 213.101-.143	11
49 C.F.R. §§ 240.1-.411	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-705

KERR-MCGEE CORPORATION
and CYPRUS FOOTE MINERAL COMPANY,
Petitioners,

v.

KEE TOM FARLEY, Individually and
on Behalf of the Estate of LUCY K. FARLEY,
CARMELITA FARLEY JOE,
and HAROLD KADY, SR., Individually and
on Behalf of the ESTATE OF JULIA MAE KADY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF THE PETITION

INTEREST OF AMICUS CURIAE [1]

The Association of American Railroads ("AAR") is a trade association representing the major railroads in the United States. Its members account for approximately

[1] No person or entity other than AAR, certain of its members and counsel have made monetary contributions toward this brief, and no counsel for any party played any role in the preparation of the brief. AAR has filed with the Clerk of the Court the consents of counsel for petitioners and respondents to file this brief.

77% of the line haulage, employ 91% of the workers, and produce approximately 93% of the freight revenues of all railroads in the United States. AAR represents its member railroads before courts, agencies, and Congress in matters of common concern.

AAR has a strong interest in this case because the Tenth Circuit's decision, though addressing a dispute involving nuclear power, has serious implications for the nation's railroads. That decision applies the doctrine of exhaustion of tribal remedies inflexibly, so as to prevent a federal court from deciding, in the first instance, claims of implied federal preemption of tribal court jurisdiction. Like the nuclear power industry, railroads are subject to comprehensive federal regulation. The Tenth Circuit's misguided extension of this Court's prior precedents will prevent railroads from obtaining prompt and definitive rulings in federal court on their federal preemption claims.

SUMMARY OF ARGUMENT

The Tenth Circuit's decision illustrates a dangerous trend in federal decisions addressing the exhaustion of tribal court remedies. The Tenth Circuit held that, because a federal regulatory statute does not expressly forbid tribal court jurisdiction, the preemptive impact of the federal regulatory scheme could not be considered in federal court until after the complete exhaustion of tribal court remedies. In the Tenth Circuit's "strict view," in the absence of an express jurisdictional bar, federal courts are precluded from considering "countervailing federal concerns" in their exhaustion analysis.

This "strict view" is based on an unwarranted extension of this Court's decisions in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). Neither of these cases dealt with preemption of tribal court jurisdiction by a comprehensive federal regulatory

scheme. Moreover, to the extent that issues of implied preemption arose in such cases, this Court analyzed them without waiting for a tribal court analysis. *See, e.g., Iowa Mutual,* 480 U.S. at 17-18 (analyzing preemptive impact of federal diversity jurisdiction). Indeed, more recently in *Strate v. A-1 Contractors,* 117 S. Ct. 1404 (1997), this Court directed that claims of implied preemption of tribal court jurisdiction arising from a federally-granted right-of-way be immediately considered by federal courts without awaiting tribal court adjudication.

The policies on which this Court's exhaustion precedents rest—the benefits of permitting tribal courts to examine and document the basis in tribal law for their own jurisdiction—do not support abstention where a highly-regulated entity raises a preemption claim based on a comprehensive federal scheme. In that circumstance, the dispositive issue will finally turn on a federal court's interpretation of the scope of federal law and not on any interpretation of tribal law. Litigants who are forced to try and appeal such cases in the tribal court system will be forced to incur unnecessary regulatory and litigation costs, as well as delay, before they can obtain an authoritative resolution in federal court.

The mistaken interpretation of this Court's precedents advanced by the Tenth Circuit has severe implications not only for nuclear energy firms, but for other regulated industries, such as the rail industry, whose operations traverse reservation lands. At least 55 Indian reservations are crossed by one or more railroad lines. These lines provide essential links for this Nation's interstate rail system and remain of undiminished importance to the flow of interstate commerce.

The rail industry's interest in this case is not abstract. In recent years, tribal authorities have increasingly sought to regulate railroads that cross reservation lands. For example, tribal ordinances have purported to regulate pas-

senger service, freight service, maintenance of freight and passenger facilities, and railroad safety. Railroads are attractive targets for tribal regulation and civil claims because they face serious practical problems in moving their track from reservation land and federal legal restraints with respect to the abandonment of service.

The railroad industry has strong claims of implied preemption: it is broadly regulated under a number of federal statutes. *See, e.g.*, Federal Railroad Safety Act, 49 U.S.C.A. §§ 20101 *et seq.* (1997 & Supp. 1997); ICC Termination Act of 1995, 49 U.S.C.A. §§ 10101 *et seq.* (1997). However, when claims implicating these statutes arise, decisions like those of the Tenth Circuit will preclude the railroads from bringing their implied preemption claims to federal court without first undergoing full-scale litigation on the merits in tribal courts. This consumes significant resources and provides no interim relief from tribal efforts to regulate railroad operations in contravention of federal statutes.

The interpretation of this Court's precedents adopted by the Tenth Circuit and other courts over the last decade is misguided. It has resulted in an overt refusal to consider, let alone properly balance, the substantial countervailing federal interests inherent in federal regulation of specific industries. This Court's intervention is necessary to delineate the appropriate factors to be considered by the federal courts in deciding whether to exercise their jurisdiction in the face of a federal preemption claim.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION IS OF SERIOUS CONCERN TO THE RAILROAD INDUSTRY

A. The Tenth Circuit Improperly Failed to Give Weight to the Federal Interest in Having a Federal Court Decide Questions of Federal Preemption

The fundamental flaw in the Tenth Circuit's exhaustion analysis is that it gave no weight to the federal interest in having a federal court decide claims of federal preemption in the absence of an express jurisdictional prohibition. Petitioners asserted that Congress' comprehensive regulation of the nuclear industry under the Atomic Energy Act ("AEA"), as amended by the Price-Anderson Act ("PAA"), 42 U.S.C. §§ 2011 *et seq.* (1994), preempted a tribal court's jurisdiction to hear "nuclear tort" claims. While conceding that this jurisdictional issue was "a close question," Pet. App. at 17a, the Tenth Circuit held that the tribal court should decide it first. In concluding that exhaustion was required, the court refused to accord any weight to the "countervailing federal concerns" under the AEA and PAA. Pet. App. at 21a. This overly "strict view" of the tribal exhaustion analysis (Pet. App. at 18a) will impede not only petitioners, but also the nation's railroads and other regulated entities, from obtaining authoritative and timely federal rulings on their preemption claims.

In the Navajo Tribal Court, respondents alleged that uranium mills operated by petitioners on Navajo reservation lands in New Mexico between 1952 and 1973 "released vast quantities of radioactive materials, causing them injuries." Pet. App. at 2a-3a. Petitioners thereafter filed a declaratory judgment action in federal district court in New Mexico, asserting that the tribal court lacked jurisdiction to adjudicate respondents' claims. Petitioners argued that the Atomic Energy Act preempted nonfederal

regulation of the nuclear industry and, more specifically, that the Price-Anderson Act provides an exclusively federal framework and forum for the prosecution of tort claims arisng from injuries allegedly sustained in a "nuclear incident." Pet. App. at 3a.

After reviewing the broad regulation of the AEA and PAA, the Tenth Circuit concluded that "[t]he PAA on its face provides the sole remedy for the torts alleged in this case. . . ." Pet. App. at 10a-11a. The Tenth Circuit then addressed petitioners' claim that the AEA and PAA preempt the tribal court's jurisdiction. The court first held that tribal court jurisdiction was not "patently violative of an express jurisdictional prohibition" of the AEA and PAA. Pet. App. at 18a (quoting *National Farmers,* 471 U.S. at 856 n.21). The court then analyzed whether it should decide petitioners' claim of implied preemption. The court conceded that petitioners' position that the PAA preempts nonfederal forums "has some force." Pet. App. at 12a. The Tenth Circuit was unwilling, however, to resolve this substantial federal issue. Instead, relying on *National Farmers* and *Iowa Mutual,* the court abstained in favor of letting petitioners' "jurisdictional challenge . . . run its course in the tribal courts" pursuant to what the Tenth Circuit called this Court's "tribal exhaustion rule." Pet. App. at 17a.

The Tenth Circuit admitted that it "at times abstains without making a detailed comity analysis," since with an apparent tribal "reservation affair there is no discretion not to defer." Pet. App. at 18a. In this case, it purported to make a comity analysis, but with factors so limited that the result was virtually preordained. The Tenth Circuit's comity analysis examined only three interests: (1) Congress' interest in supporting tribal self-government; (2) promoting judicial efficiency "by allowing a full record to be developed in the tribal court"; and (3) "obtaining the benefit of tribal expertise if further review becomes neces-

sary." Pet. App. at 18a. Because these interests were ostensibly served by an initial tribal court decision on jurisdiction, the Tenth Circuit abstained from deciding the federal preemption question. Pet. App. at 18a.

In performing this comity analysis, the Tenth Circuit *expressly* refused to consider "the strong role afforded courts in resolving Price-Anderson suits." Pet. App. at 21a. In its view, "[c]onsideration of federal jurisdictional concerns is only appropriate in the context of determining whether to engage in the comity analysis at all" (*i.e.*, only in determining whether there is an express jurisdictional provision). However, where claims of implied preemption and associated federal interests are raised, the "*National Farmers* framework does not accord countervailing federal concerns a place in the comity analysis." Pet. App. at 21a.

This misreading of this Court's prior decisions threatens to cut off appropriate access to the federal courts for railroads raising implied preemption claims. The Tenth Circuit's "strict view" of the tribal exhaustion doctrine is, unfortunately, not unique. With increasing frequency, courts of appeals are requiring exhaustion of tribal remedies with respect to federal cases raising issues of implied preemption.[2] Other circuit courts have indicated that they will also apply the exhaustion doctrine in a wholly mechanical fashion.[3] The Tenth Circuit's decision demon-

---

[2] *See Reservation Tel. Coop. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 76 F.3d 181, 185-86 (8th Cir. 1996) (exhaustion mandatory because federal statute apparently preempting tribal tax on telephone lines on reservation did not expressly divest tribal court of jurisdiction); *Burlington Northern R.R. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991) ("exhaustion of tribal remedies is not discretionary; it is mandatory").

[3] *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1421 (8th Cir. 1996) (exhaustion mandatory because preemptive Indian Gaming Regulatory Act does not *expressly* divest tribal court of jurisdiction); *Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 66 (2d Cir. 1997) (if none of the three exceptions under *National Farmers* applies, "exhaustion is required").

strates a disturbing and recurring interpretation under which federal interests are given no weight in determining whether a claim of implied federal preemption should be heard in federal court without first requiring exhaustion of tribal remedies.

B. The Tenth Circuit's Refusal to Consider Competing Federal Interests When Applying The Tribal Exhaustion Rule Raises Serious Concerns for the Nation's Railroads

The *Kerr-McGee* petitioners, having properly litigated their claims of express preemption in two levels of federal courts, must now litigate the question of implied preemption through at least two levels of tribal courts before obtaining a definitive resolution in a federal court. As the tribal trial court found that its jurisdiction withstands the federal regulatory scheme, petitioners must undergo a full trial on the merits and an appeal within the tribal court system before having any opportunity to present their claim of implied preemption to a federal court.

The impact of the Tenth Circuit's "strict view" is striking. For the duration of the litigation, the entity subject to federal regulation typically is exposed to local (*i.e.* tribal) regulation. This is precisely the danger against which federal preemption doctrine was designed to protect. The regulated entity also incurs the cost of litigating the case on its merits, despite the risk that the entire proceeding may ultimately be found by a federal court to be void. And, it runs the risk of a huge verdict at the hands of a jury composed solely of tribal members. *See Burlington Northern R.R. v. Red Wolf*, 106 F.3d 868, 869 (9th Cir. 1996) ($250 million verdict arising from grade crossing accident), *vacated*, 118 S. Ct. 37 (1997). It is little consolation to those who have suffered these costs that the tribal court judgment may ultimately be set aside as preempted, as they then face the prospect of the litigation beginning anew in another forum.

The operational and legal risks associated with a denial of access to the federal courts are particularly severe for the nation's railroads. Railroads are tempting targets for tribal regulation, taxation and civil liability claims. Pursuant to federal rights-of-way, one or more railroads cross the lands of at least 55 reservations in 16 states. This century-old configuration is not apt to change, since a large number of these are main rail lines that cannot be abandoned.

The members of the Association of American Railroads have already seen a number of attempts by tribes to engage in improper regulation of railroad operations on reservation lands. For example, the case of *Burlington Northern R.R. v. Crow Tribal Council,* 940 F.2d 1239 (9th Cir. 1991), dealt with a Crow Tribal Common Carrier Ordinance adopted in 1982 which established "general duties" of "railroad lines" operating on the tribe's reservations. Among other things, it: (1) authorized Crow enforcement of federal law and Crow health and safety regulations consistent with federal law; (2) required regular reservation rail service, "sufficient accommodations," and maintenance of freight and passenger facilities and authorized the tribe "to compel" compliance therewith; and (3) prohibited any railroad from discontinuing use of any facility without a hearing before the tribal regulatory commission. *Id.* at 1241.

Despite the potential for implied preemption, the Ninth Circuit ordered the railroad to exhaust its remedies in tribal court, even though no action was pending in any tribal forum. The Ninth Circuit emphasized that the district court had no discretion not to abstain from hearing the railroad's claim in deference to the tribal court. *Burlington Northern R.R.,* 940 F.2d at 1245.

The Crow tribal ordinance raised obvious preemption issues under the Federal Railroad Safety Act ("FRSA"), as amended. 49 U.S.C. §§ 20101-153 (1994). Section 20106 of the FRSA expressly preempts state regulation

of areas regulated federally, and the federal courts have given a broad interpretation to the scope of such preemption.[4] FRSA sections 20111-112 provide for enforcement by the Secretary of Transportation and Attorney General; section 20113 permits state enforcement of federal laws and regulations only if approved by the Secretary and requires the state to bring civil actions in a federal district court. *See* 49 U.S.C. §§ 20111-113 (1997). Federal regulations also specifically prescribe how states may participate in the enforcement of FRSA laws and regulations. 49 C.F.R. pt. 212 (1996). The Crow tribal ordinance, however, purports to permit Crow enforcement of health and safety regulations, without approval by the Secretary, and implicitly authorizes enforcement in tribal rather than federal court.

The preemptive scope of federal regulation of railroads extends beyond safety. The ICC Termination Act of 1995 ("ICCTA") vests "exclusive jurisdiction" in the Surface Transportation Board over the "services and facilities" of railroads and "preempt[s] the remedies provided under Federal or State law." 49 U.S.C.A. § 10501(b)(2) (1997). Both federal and state courts have uniformly held that, under this statute, all efforts by state or local governments to regulate the establishment or discontinuance of railroad facilities or services have been preempted by federal law.[5] Yet this is precisely an area covered by the earlier Crow tribal ordinance.

---

[4] *See, e.g., Burlington Northern R.R. v. Minnesota*, 882 F.2d 1349, 1353 (8th Cir. 1989) (FRSA preempts state caboose law since FRSA permits "the use of end-of-train telemetry devices as substitutes for visual brakes inspection"); *Burlington Northern R.R. v. Montana*, 880 F.2d 1104, 1106 (9th Cir. 1989) (same); *Missouri Pac. R.R. v. Railroad Comm'n of Texas*, 850 F.2d 264, 268 (5th Cir. 1988) ("virtually all state regulations affecting the train itself appear preempted by federal law"), *cert. denied*, 488 U.S. 1009 (1989).

[5] *See Burlington Northern R.R. v. Page Grain Co.*, 545 N.W.2d 749, 751 (Neb. 1996) ("[s]tate courts no longer have jurisdiction

Similarly, in 1996, the Bad River Band of Lake Superior Tribe of Chippewa Indians enacted a "Railroad Safety Ordinance." This ordinance purported to regulate, among other things, the track to be used on reservation lands (a "minimum of 115 lb rail") and the "qualifications" of railroad personnel on trains crossing the reservation, notwithstanding that the FRSA and regulations promulgated thereunder regulate track safety and operation [6] and the "licensing or certification" of locomotive engineers.[7]

These examples of tribal efforts to regulate railroads underscore the seriousness with which the railroad industry views this issue. Like regulations adopted by state and local governments, tribal regulations contravene the congressional policy calling for "nationally uniform" regulation of railroads.[8] Railroads have been able to obtain some measure of protection from such burdens when imposed by state and local governments through federal precedents applying theories of express and implied preemption. *See, e.g., CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 676 (1993); *Burlington Northern R.R. v. Montana,* 880 F.2d at 1106. However, the sweeping exhaustion theory followed by the court below—which accords no weight to the federal interests at all—threatens to eliminate any timely opportunity for railroads to seek federal protection from unauthorized and inappropriate tribal regulations. Accordingly, this Court should consider whether a claim of implied preemption, such as petitioners have advanced

---

to consider the practices, routes, services, and facilities of interstate rail carriers" because of preemption by ICCTA); *Georgia Pub. Serv. Comm'n v. CSX Transp., Inc.*, 484 S.E.2d 799 (Ga. Ct. App. 1997) (ICCTA preempts Georgia PSC's prohibition of CSX's reduction of staff at facility and consolidation of services).

[6] *See* 49 U.S.C. § 20142; 49 C.F.R. §§ 213.31-.37 (track roadbeds), 213.51-.63 (track geometry), 213.101-.143 (track structure).

[7] *See* 49 U.S.C. § 20135 (1994); 49 C.F.R. §§ 240.1-.411 (1996).

[8] 49 U.S.C. § 20106.

here, may properly be considered by a federal court without the need for exhaustion of tribal court remedies.

II. THIS COURT SHOULD CLARIFY THE SCOPE OF TRIBAL COURT EXHAUSTION

A. This Court's Precedent Has Been Misconstrued

The decision below represents a dramatic over-extension of this Court's precedents dealing with tribal court exhaustion. None of this Court's three cases addressing exhaustion of tribal court remedies involved a claim of preemption based upon comprehensive federal regulation. To the extent that claims of implied preemption by federal law were raised in these cases, they were actually considered by this Court without need for tribal court illumination.

This Court's precedents do not require or support the "strict view" followed by the court below. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), was a personal injury case arising from a motorcycle accident in a school parking lot on the Crow Indian reservation. The Court rejected the petitioners' claim that tribal court jurisdiction over nonmembers in tort cases was foreclosed in the same manner as criminal jurisdiction under *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). In contrast to legislation granting federal courts jurisdiction over Indian crimes, "there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on . . . Indian reservations." *National Farmers*, 471 U.S. at 854. The Court instead found that it would depend upon a "careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *Id.* at 855-56.

The Court reasoned that permitting the tribal court to make the initial examination of these issues—issues relat-

ing directly to the scope of tribal sovereignty—would be useful for several reasons. These included "tribal self-government and self-determination" and fostering "the orderly administration of justice in the federal court" based on the development of a full record in the tribal court. *Id.* at 856-57. The Court explained that exhaustion would "encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *Id.* at 857. Thus, the Court held that in a "case of this kind" the examination of the scope of tribal sovereignty "should be conducted in the first instance in the Tribal Court itself." *Id.* at 856.

In *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9, 16 (1987), this Court followed much the same analysis in considering whether the federal courts should adjudicate an insurance coverage dispute that was also pending in tribal court. The courts below had dismissed the claims to permit tribal exhaustion. This Court affirmed, but not without first giving extensive consideration to the petitioner's argument that tribal court jurisdiction was impliedly preempted by the federal diversity statute. This Court resolved that question of federal law on its merits, holding that "[i]n the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts," *id.* at 18, it would not find a limitation on tribal sovereignty. The remaining jurisdictional question—whether the tribal courts actually had jurisdiction over the third-party coverage dispute—was left to the tribal court system.

Most recently, in *Strate v. A-1 Contractors,* 117 S. Ct. 1404 (1997), this Court reviewed its exhaustion cases and reiterated that the analysis is a " 'prudential rule' . . . based on comity" and not an "unyielding requirement." *Id.* at 1410, 1413, 1411 n.7. There, the Court found that where a nonmember of the tribe was proceeding through

the reservation on a right-of-way granted by a federal statute, 25 U.S.C. §§ 323-328 (1994), the tribe had lost its "gatekeeping right," *id.* at 1414, and therefore could not assert jurisdiction over the nonmember. Though the right-of-way statute did not contain an express prohibition on tribal court jurisdiction, the Court itself concluded that, in this situation, "the otherwise applicable exhaustion requirement . . . must give way, for it would serve no purpose other than delay." *Id.* at 1416 n.14. In short, the Court recognized and applied a theory of implied preemption and directed the federal courts to apply it in future federal cases without requiring exhaustion of tribal remedies.

Thus, to the extent that claims of implied federal preemption arose in these cases, this Court considered them on their merits or indicated that they could be considered by other federal courts without first requiring exhaustion of tribal remedies. This Court has *never* dealt with tribal court exhaustion in the context of implied preemption arising from a comprehensive regulatory scheme. However, as its precedents suggest, the very policies that support tribal court exhaustion in the context of a routine personal injury or contract case argue for a prompt and definitive federal court decision in the context of a regulatory preemption challenge.

In that circumstance, it is not the *tribe's* asserted basis for jurisdiction that is in issue, but rather the scope of the *federal* scheme—the intent of Congress—that is dispositive. These are matters routinely addressed by federal courts, whereas tribal courts encounter them infrequently, if at all. Moreover, as the case before the Court demonstrates, analysis of a claim of implied preemption of tribal court jurisdiction does not usually call for a review of tribal law, and rarely requires an extensive factual record. If the federal scheme fully occupies the field, the precise

basis for tribal court jurisdiction will be largely irrelevant.[9]

Nor is referral of such matters to tribal courts consistent with the orderly administration of justice. Given that *express* preemption claims may properly be heard immediately in federal court, a flat refusal to hear *implied* preemption claims until after litigation of the merits in tribal court is hugely wasteful of the resources of both court systems, as well as the time and assets of the litigants. The Tenth Circuit's approach to preemption is *dis*-orderly—a formula for unending, multi-court litigation. Indeed, even the policies supporting tribal autonomy are implicated to a lesser degree when the decisive questions are the scope and intent of a federal regulatory scheme rather than identification of the limits of tribal sovereignty. These are issues on which federal courts will obviously have the last word. A dry run of these issues in tribal court seems pointless and ultimately corrosive of true tribal court autonomy.

This Court has recognized that its precedent concerning the exhaustion of tribal remedies has been "variously interpreted." *Strate*, 117 S. Ct. at 1413, 1411 n.7. Tribal court exhaustion was designed to permit tribal courts to illuminate questions of tribal law and identify the bases for tribal court jurisdiction. However, when a tribal claim or regulation encroaches into areas heavily regulated by federal law, substantial federal interests independent of those that support tribal self-determination come into play and must be considered when deciding whether exhaustion of tribal remedies is necessary. The Tenth Circuit not only interpreted this Court's precedents as not requiring

---

[9] *See, e.g., California Fed. Savs. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81 (1987) ("[c]ongressional intent to pre-empt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation.") (citation omitted); *Pennsylvania R.R. v. Public Serv. Comm'n*, 250 U.S. 566, 568 (1919).

such consideration; it held that they forbid it. Pet. App. at 21a. This interpretation deserves further review by this Court.

B. This Petition Provides a Vehicle for Developing a More Flexible Exhaustion Doctrine

This Court should clarify the guidelines for analyzing claims of federal preemption of tribal court jurisdiction. This case provides an ideal vehicle for this purpose. The federal regulatory scheme in question is comprehensive and reflects a vital national interest. The Court already has the benefit of extensive decisions from both the federal and tribal court systems. If this case is not taken, litigants in other cases dismissed on grounds of exhaustion may choose not to press their claims to the appellate level, leaving the core problem unresolved and unreviewable for years.[10]

This case offers an opportunity for this Court to clarify the fundamentals of exhaustion analysis as applied to tribal courts. Consideration of competing interests is inherent in any comity analysis. *See, e.g., Hilton v. Guyot*, 159 U.S. 113, 164 (1895); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976) (important considerations are "wise judicial administration," "conservation of judicial resources" and "comprehensive disposition of litigation"), *cited in Iowa Mutual*, 480 U.S. at 16 n.8; *Younger v. Harris*, 401 U.S. 37, 44 (1971). Nothing in such an analysis conflicts with this Court's admonition in *National Farmers* that "the existence and extent of a tribal court's jurisdiction will require a careful

---

[10] Certainly, the substantive questions of preemption raised by this petition will not be available for decision by the federal courts until verdicts have been rendered in the tribal courts, appealed within the tribal system, and then challenged and appealed within the federal system. Even then, the exhaustion issue raised here will likely be moot, and may not be capable of resolution by this Court.

examination of tribal sovereignty . . . [and] a detailed study of relevant statutes, Executive Branch Policy . . . and administrative or judicial decisions." *National Farmers*, 471 U.S. at 855. In fact, where substantial countervailing federal interests are involved, *National Farmers* seems to require—not forbid—consideration of those interests.

This Court's precedents call for a "prudential" balancing of federal interests when deciding whether a tribal or federal court should first address the reach of the tribal court's jurisdiction. The Tenth Circuit held that such a balancing is forbidden even where federal law almost surely preempts tribal law. Because railroads and members of the many other federally-regulated industries, including petitioners, will suffer injury if such a misreading of this Court's precedents continues, this Court should take this opportunity to clarify the law of exhaustion of tribal court remedies.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted.

Of Counsel:
LOUIS P. WARCHOT
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2502

December 22, 1997

BETTY JO CHRISTIAN
Counsel of Record
CHARLES G. COLE
B. KELLY KISER
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-8113
Counsel for Amicus Curiae Association of American Railroads